SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

No. 1146

IN THE

Supreme Court of the United States

October Term, 1967.

SCHOOL DISTRICT OF PHILADELPHIA, CITY OF PHILADELPHIA, STATE OF MICHIGAN, STATE OF ALASKA, CITY OF ROCHESTER, CITY OF MADISON HEIGHTS, CITY OF LOS ANGELES, BOARD OF EDUCATION OF THE CITY OF PASSAIC, DOWNINGTOWN AREA SCHOOL DISTRICT, RAHWAY BOARD OF EDUCATION, CITY OF TAMPA, MADISON SCHOOL DISTRICT, BOARD OF EDUCATION OF NEWARK, BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, LINDEN BOARD OF EDUCATION,

Appellants,

v.

UNITED STATES OF AMERICA, HARPER AND ROW PUBLISHERS, INC., THE BOBBS-MERRILL COMPANY, INC., CHILDRENS PRESS INC., THOMAS Y. CROWELL COMPANY, DODD, MEAD & COMPANY, INC., E. P. DUTTON & COMPANY, INC., GOLDEN PRESS, INC., GROSSET AND DUNLAP, INC., HOLT, RINEHART & WINSTON, INC., LITTLE, BROWN & COMPANY, INC., THE MACMILLAN COMPANY, WILLIAM MORROW & COMPANY, INC., G. P. PUTNAM'S SONS, RANDOM HOUSE, INC., CHARLES SCRIBNER'S SONS, THE VIKING PRESS, INC., HENRY Z. WALCK, INC. and FRANKLIN WATTS INC.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT.

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

SCHOOL DISTRICT OF PHILADELPHIA, ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

Appellants, School District of Philadelphia, et al., appeal from the Orders of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States of America v. Harper & Row Publishers, Inc.*, and related cases, Civil Actions No. 67 C 612 through 67 C 629, entered on November 27, 1967, which, *inter alia*, denied appellants' motions, filed on November 13, 1967:

(a) To intervene under Rule 24 of the Federal Rules of Civil Procedure and

(b) For an order rejecting the proposed consent judgments in those cases unless the consent judgments included limited admissions, by defendants, of violations of Section I of the Sherman Act.

Appellants also appeal from the District Court's Orders approving the consent judgments, which were entered below on November 27, 1967. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW.

There was no opinion in the court below.

JURISDICTION.

These eighteen related civil actions were brought by the United States against eighteen publishers of children's books pursuant to section IV of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 609, 15 U. S. C. Sec. 4, to enjoin violations of Section I of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U. S. C. Sec. 1.

Stipulations consenting to the entry of final judgment were executed by the United States and all publisher-defendants and were filed in the court below on October 23, 1967, providing for the entry of final judgment at any time after the expiration of thirty days from the date of filing, absent withdrawal of consent by the United States. On November 13, 1967, appellants, sovereign states of the United States, cities, and public institutions, and major purchasers of children's books, filed applications for leave to intervene. On November 27, 1967, the Order of the District Court (Appendix A) was entered, denying appellants applications and, on the same date, the District Court entered identical orders, approving, with certain modifica-

tions, the consent judgments (Appendix B). Appellants' notice of appeal was filed on January 26, 1968 in the District Court.

The jurisdiction of the Supreme Court is conferred by Section II of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 36 Stat. 1167, 58 Stat. 272, 62 Stat. 989, 15 U. S. C. Sec. 29. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Company,* 386 U. S. 129, 87 S. Ct. —, 17 L. Ed. 2d 814 (1967); *Allen Calculators, Inc. v. Nat. Cash Register Co.,* 322 U. S. 137, 64 S. Ct. 905, 88 L. Ed. 1188 (1944), *reh. den.,* 322 U. S. 771, 64 S. Ct. 1257, 88 L. Ed. 1596 (1944); *Missouri-Kansas Pipeline Company v. U. S.,* 312 U. S. 502, 61 S. Ct. 666, 85 L. Ed. 975 (1941), *reh. den.,* 312 U. S. 715, 85 L. Ed. 1145 (1941); *U. S. v. California Co-op. Canneries,* 279 U. S. 553, 49 S. Ct. 423, 73 L. Ed. 838 (1929).

QUESTIONS PRESENTED.

1. Where the United States has brought related civil antitrust actions against eighteen book publishers, charging price fixing conspiracies and other anti-competitive activities in the sale of children's books purchased with public funds expended by federal, state and local governments; and where, prior to court approval of proposed consent decrees in such actions, and prior to the expiration of the 30 day period following the filing of such decrees during which the United States had the right to withdraw its consent, appellants sought leave to intervene:

(a) Did the District Court err in refusing to grant intervention under Federal Rule of Civil Procedure 24 to appellant states, cities, and public institutions for the specific protection of whose interests such actions were instituted by the United States?

(b) Did the District Court err in refusing to condition its approval of the proposed consent decrees upon the inclusion therein of limited admissions by defendants of violations of Section 1 of the Sherman Act, where state and local governments were already spending substantial funds pursuing private antitrust actions to recover overcharges suffered as a result of the same price-fixing violations alleged in the actions brought by the United States, such actions having been brought in the discharge of its statutory duties to enforce the antitrust laws effectively?

STATEMENT OF THE CASE.

A. Federal Proceedings.

Appellants are sovereign states of the United States and also cities and public institutions who, during the period 1956 to the present, have made and continue to make substantial purchases of children's books directly or indirectly from defendants in the civil actions described below and from publishers and wholesalers who are alleged co-conspirators of the defendants. On April 18, 1967, eighteen separate civil actions were filed by the United States of America in the Northern District of Illinois, Eastern Division, against separate defendant publishers, charging in each instance that the defendants involved, together with other companies and persons unnamed, participated in an unlawful combination and conspiracy commencing at various dates indicated, as early as 1961, to restrain the interstate trade and commerce of the sale of library editions of children's books in violation of Section 1 of the Sherman Act; that this combination and conspiracy consisted of a continuing agreement to fix, maintain and stabilize the prices of library editions of children's books, and resulted in high, artificial and non-competitive levels of prices, the suppression of price competition, and the elimination of the benefits of competitive bidding. It was alleged in each of these complaints (Appendix C) that "most of these purchases [of children's books] are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books." (Complant, Paragraph 8).

On October 23, 1967, before hearings were commenced, a stipulation was filed with the District Court by the United States Department of Justice, Antitrust Division, and each of the defendant publishers in the eighteen separate proceedings, consenting to the entry of final judgments after the expiration of thirty days from filing of the stipulation, unless the Federal Government withdrew its consent prior thereto. Each final judgment provided for dismissal of the federal proceedings under Orders which in general would enjoin each of the defendants from future price-fixing activities and collusive bidding for a period of five years. Each of the suggested final judgments was to provide:

> "Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;
>
> Now, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,
>
> ORDERED, ADJUDGED and DECREED . . ." [text omitted] (Appendix B, Final Judgment, Preamble).

B. Intervention by States and Municipal Bodies.

Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U. S. C. Sec. 16(a), provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-

> trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . ."

The Congress of the United States by various enactments, including the "Elementary and Secondary Education Act of 1965, 79 Stat. 36, 20 U. S. C. Sec. 821 et seq., has appropriated substantial amounts for the purpose of making grants to states:

> "For the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools." 20 U. S. C. Sec. 821.

Pursuant to such federal acts, and during the period of the alleged illegal conspiracy, substantial allocations and grants of federal funds for the purchase of library books have been made to the appellant states, which in turn distributed such funds to state agencies, institutions, and public schools who purchased library editions of children's books. Appellants represent a multitude of public agencies, school districts, and public libraries (Tr., November 13, 1967, p. 10).

Private treble damage actions have been filed by appellants in the Eastern District of Pennsylvania (Civil Action No. 40537),[1] naming as defendants, among others,

1. Treble damage actions on behalf of other states and municipalities have been filed in the Northern District of California, the District of Kansas, the Northern District of Illinois, the Eastern

the eighteen publishing companies who are separately named as defendants in these present actions and alleging substantially the same conspiracy as that alleged here. Appellants' treble damage complaint charges the existence of a combination and conspiracy among the eighteen publisher-defendants and other publishers and wholesalers of library editions of children's books, during the period from a date at least as early as 1956 to date, to fix, maintain and stabilize the prices of such books sold to plaintiff states and public institutions, which resulted in the payment of high, artificial and non-competitive prices. Threefold damages are sought for the substantial injury and damage caused by the alleged conspiracy.

An adjudication of the merits of the issues in the cases brought by the Justice Department would involve matters and issues which would also have to be determined in the private treble damage actions. Under Section 5(a) of the Clayton Act, the adjudication of such matters and issues adversely to defendants in the proceedings brought by the *Justice Department would then be prima facie evidence* against such defendants in the state and local treble damage actions.

Before the consent decrees had been signed by the District Judge, on November 13, 1967, appellants moved for leave to intervene [2] in the Justice Department's actions pursuant to Federal Rule of Civil Procedure 24; and re-

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District of Massachusetts, and the Western District of Wisconsin. Also, the attorneys general and municipal attorneys of other states and cities have expressed their intention to the court to file treble damage actions on behalf of their respective states and cities. *Brief in Support of Petition for the Preservation of Documents,* In re Grand Jury Proceedings, No. 66 GJ 3003, N. D. Ill., E. Div., p. 4 (Dec. 8, 1967).

2. States, cities and municipal bodies who are parties to treble damage actions in Districts other than the Eastern District of Pennsylvania also moved to intervene, requesting similar relief. Their motions and requests for relief were denied by the same Order from which this appeal is taken. These other states, cities and municipal bodies are taking separate appeals from this Order to this Court.

quested that the proposed consent judgments be rejected by the Court unless the defendants agreed to the inclusion of limited admissions of violations of Section I of the Sherman Act for the sole purpose of giving *prima facie* effect to such admissions in appellants' pending treble damage actions.

On November 27, 1967, the District Court denied appellants' motion to intervene (Appendix A) and entered Orders (Appendix B) approving the consent judgments entered between the United States and the eighteen defendant-publishers, substantially in the form originally submitted by the parties to the Court.[3]

The dismissal of the federal proceedings under the consent judgments approved by the District Court are "without admission" by the defendants of any matter or issue encompassed by the charges made that an unlawful price-fixing combination and conspiracy existed over many years which substantially injured and damaged public purchasers of library editions of children's books. The proposed consent judgments provide defendants with an innocuous escape from the consequences of past serious legal offenses under the promise of not engaging in future similar illegal activities. By this device the public victims of the price-fixing conspiracy are denied substantial help and benefit, in recovering damages, from the Justice Department's proceedings.

The Antitrust Division of the Department of Justice conducted an extensive investigation of the facts prior to filing their Complaint. This investigation of facts was aided by inquiries conducted in March and May, 1966, by

3. Appellants also requested certain relief with respect to documents which had been collected by the Justice Department during the course of the federal investigation and grand jury proceedings. This relief was substantially granted by the District Court and from this part of the Order appellants do not appeal.

the "Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary of the United States Senate", under the chairmanship of Senator Philip Hart of Michigan. By the employment of simple consent decrees, the fruit of these extensive investigative labors now comes to no more than an assurance that defendant publishers will not violate the antitrust laws in the future.

THE QUESTIONS ARE SUBSTANTIAL.

A. The Economic and Social Impact of the Case.

As the District Judge recognized, these cases are of great economic importance:

> "I think where taxpayers' money is directly involved and where the charge is as serious as the charge made here that involves millions of dollars, not only of government money that went towards the support and purchase of school textbooks, but of local taxpayers, that we should give consideration to accommodate those seeking to intervene to the extent that we can . . ." (Tr., November 13, 1967, p. 169).

Senator Philip A. Hart, Chairman of Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary of the United States Senate, stated at the outset of the Senate's investigation of price fixing in sales of children's books:

> "The basic question at this hearing is simple: Is an agreement between publishers and wholesalers forcing librarians to pay inflated prices for children and youth books?
>
> "The question certainly is not an idle one. Librarians will testify that more and more they are forced to buy children's books which cost 50 per cent more than other editions of the same books. Further, they will testify that when they ask for bids in order to get competitive prices that the prices are not competitive—but identical.
>
> "A school librarian will testify that approximately 60 per cent of the books offered her library are available only in inflated-price editions. Librarians will

tell us that the percentage figure is growing annually. . . .

"The books involved account for about one-half of the circulation of public libraries. Not only are they purchased with taxpayers' funds, but the Federal Government and many local and State governments are on a concerted campaign to increase appropriations for books. Congress would not like to increase appropriations if—as librarians tell us—the federal money is simply covering the difference between the best price and the price librarians must pay for these books . . .

"Book prices [the Senate Committee on Labor and Public Welfare] pointed out—are now 31 per cent more than in 1957-59." *Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, 89th Congress, Second Session, March 23, 1966,* transcript, p. 1-2.

The legal questions involved are no less important. These questions involve (a) a clarification of the rights of public bodies to intervene in federal antitrust actions involving important state and local interests, pursuant to Federal Rule of Civil Procedure 24 as recently interpreted in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company,* 386 U. S. 128, 87 S. Ct. —, 17 L. Ed. 2d 814 (1967), and (b) the propriety of permitting the avoidance of the *prima facie* effect of Section 5(a) of the Clayton Act by the entry of consent judgments in cases involving flagrant price-fixing in an industry vital to the welfare of the United States and its citizens.

B. The Question of Intervention.

The initial question before this Court is whether or not appellants should have been granted leave to intervene, under the recently-amended Federal Rule of Civil Proce-

dure 24(a), as a matter of right, or permissively under Federal Rule of Civil Procedure 24(b). Federal Rule of Civil Procedure 24 provides in pertinent part:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and *he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest,* unless the applicant's interest is adequately represented by existing parties . . .
>
> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . ." (Emphasis supplied)

The right of public and private parties to intervene in a proceeding, in which a decree enforcing the antitrust laws is being framed, has recently been upheld by this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company, supra.* In this case, Southern California Edison, a large industrial user of natural gas, Cascade Natural Gas Corporation, a distributor of natural gas, and the State of California moved to intervene in the proceeding in which an order was being framed providing for divestiture by major gas producers. Southern California Edison and the State of California were moving for intervention under the former F. R. C. P. 24(a), prior to the recent amendment effective July 1, 1966. This Court ruled that all applicants were to be granted leave to intervene as of right, stating:

> "In the present case protection of California interests in a competitive system was at the heart of our

mandate directing divestiture . . : It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect." *Ibid.*, 17 L. Ed. 2d at 819.

In the present case, appellant states and municipal bodies were purchasers from defendants, and it is appellants' interests that these federal civil proceedings were designed to protect.

Intervention by private parties, within that class to be protected by the consent judgment, has been permitted in consent decree proceedings. *Missouri-Kansas Pipe Line Company v. U. S.*, 312 U. S. 502, 85 L. Ed. 975 (1941), *reh. den.*, 312 U. S. 715, 85 L. Ed. 1145 (1941); *U. S. v. Vehicular Parking, Ltd.*, 7 F. R. D. 336 (D. Del. 1947). See also *U. S. v. Terminal R. R. Association*, 236 U. S. 194, 59 L. Ed. 535 (1915); *U. S. v. Swift & Company*, 286 U. S. 106, 76 L. Ed. 999 (1932).

There is no question that appellants' motion to intervene was timely, having been filed within twenty-one days after the initial filing of the proposed consent judgments.[4] Moreover, it is clear that, prior to the attempted intervention, appellants were not adequately represented by existing parties; both the government and all defendants were opposed to the relief sought by appellants, and both had provisionally approved the consent decrees to which appellants objected and continue to object. Appellants were "without a friend in this litigation", *Atlantis Development Corp., Ltd. v. United States*, — F. 2d —, 11 F. R. Serv. 2d 24(a) 2, Case 1, p. 348 (5th Cir. 1967).

The important question to be decided by this Court under new Rule 24, as recently interpreted in *Cascade*, is

4. In this sense, this case is readily distinguishable from *U. S. v. Blue Chip Stamp Co.*, 1967 Tr. Cas. ¶ 72,239 (C. D. Cal. 1967), *aff'd.* sub nom. *Thrifty Shoppers Scrip Co. v. U. S.*, 36 L. W. 3278 (1968), in which the petitions to intervene were filed after approval of the consent decrees by the Court.

whether or not appellants have an interest which falls within the protective scope of F. R. C. P. 24(a)(2), or, in the alternative, whether denial of leave to intervene under F. R. C. P. 24(b) was an abuse of discretion by the court below.[5] The Fifth Circuit, in a recent decision following *Cascade,* has taken a liberal and expansive view of the nature of the interests protected by Rule 24. *Atlantis Development Corp., Ltd. v. United States, supra.* In that case, Atlantis Development Corporation was denied intervention in a suit instituted by the Government against defendants in which the Government sought to assert dominion and control over a number of coral reefs, charging trespass against the defendants. Atlantis claimed ownership of the reefs. The Circuit Court, in reversing the District Court, held that Atlantis should have been permitted to intervene as of right. The Court stated that new Rule 24 had done more than "to abandon the rigidity of Sam Fox[6] and codify the ameliorative exceptions . . . [of case law development which had been necessary] to escape the unfortunate consequences of a ruling expressed in terms of the party being 'bound', i.e., *res judicata.*" *Ibid.* at p. 348. The Court further stated that, in its revision of Rules 19, 23 and 24, the Advisory Committee, "unsatisfied with the former Rules which too frequently defined application in terms of rigid legal concepts such as joint, common ownership, *res judicata,* or the like, as well as court efforts in applying them, deliberately set out on a more pragmatic course." *Ibid.* at p. 347. See also *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra,* 17 L. Ed. 2d at 818, n. 3. Turning to the facts before it, the Court recognized that "the judgment as between the Government and defendants

5. The issues of law and fact in appellants' actions and the Federal action are substantially identical, save for the issue of damages.

6. *Sam Fox Publishing Co. v. U. S.,* 366 U. S. 683, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961).

cannot have any direct, immediate effect upon the rights of Atlantis, not a party to it." *Atlantis Development Corp., Ltd. v. U. S. supra,* at p. 349. However, the pragmatic approach dictated by new Rule 24 demanded that intervention be granted. Certain questions of law which would ultimately be involved in a separate suit between Atlantis and the United States would necessarily be decided in the case before the Court. The court squarely held that the weight of precedent which would be given to these decisions of questions of law might be such an obstacle to Atlantis, if decided contrary to their interests, that as a practical matter their intervention in the suit was the only way that they could properly protect their interest.

In the instant case, the dismissal of the Federal proceeding under the consent judgments approved by the District Court are "without admission" by the defendants of any matter or issue encompassed by the charges made that an unlawful price-fixing combination and conspiracy existed over many years which substantially injured and damaged public purchasers of library editions of children's books. Such consent judgments, which preclude the use by appellants of Section 5(a) of the Clayton Act, will deprive appellants of the many benefits of the resources and expertise of the Federal Government in the field of antitrust enforcement. (However, the Federal Government, through the Comptroller General of the United States, might well demand a share of any treble-damage recovery, claiming that it is entitled to that proportion of the recovery equivalent to the Federal Government's contribution made under the Elementary and Secondary Education Act of 1965. See Letter of Comptroller General of the U. S. to Admin., F. H. A., Department of Transportation, October 11, 1967, 1967 Tr. Case ¶72,250.) Such consent judgments will place directly upon the states and municipal bodies the entire burden of labor and expense for recouping, for their citi-

zenry, unlawful charges made in flagrant violation of federal statutes. The practicalities of private antitrust enforcement clearly demonstrate that appellants' interests in the prosecution of their rights, as amplified by Congressional policies to assist private treble damage litigants, are thus severely impeded and impaired.

Appellants will not only be impeded, as a practical matter, but will be precluded from the relief they seek if they are denied intervention in the instant case. Appellants asked the District Court to reject proposed consent decrees. There was no forum other than the Northern District of Illinois in which to request this relief.

Appellants seek to protect their interests in that portion of the competitive system which involves a commodity, children's books, which is vital to the welfare of this country. The form of judgment sought by appellants would be a public admission, by the publisher defendants, that they have engaged in unlawful acts. Such public confession would have a strong ameliorative effect on the publishing industry, not only by force of the stigma attached to the public confession, but by force of the fact that public libraries throughout the country will be put on notice of the Sherman Act violations of defendants and be alerted to insure enforcement of the Final Decree entered by the District Court. Having been denied intervention, the consent decrees, entered over appellants' objection, provide neither a public admission of guilt nor the benefits provided by Section 5(a) of the Clayton Act.

The Court below did not choose to take the liberal approach towards the new Rule 24 which was taken by the Fifth Circuit in *Atlantis* and which, it is submitted, is called for by the *Cascade* decision. A recent case in the Ninth Circuit, distinguishable on its facts from this case, has also taken a restrictive view of Rule 24. *U. S. v. Blue Chips Stamp Company,* 1967 Tr. Cas. ¶72,239 (C. D. Cal. 1967).

In that case, petitioners moved to intervene in a government suit *after* its settlement by consent decree. Petitioners were also parties to private antitrust actions charging antitrust violations similar to those settled in the government suit. Intervention was denied.[7] The Court, by citing *Sam Fox Publishing Company, et al. v. U. S., supra,* and *Sutphen Estates, Inc. v. U. S.*, 342 U. S. 19, 72 S. Ct. 14, 96 L. Ed. 19 (1951), *reh. den.*, 342 U. S. 907, 72 S. Ct. 289, 96 L. Ed. 679 (1952), evidenced a reluctance to depart from a view of intervention as of right, which, as expressed in those cases, was found too restrictive and formalistic by the Advisory Committee to the 1966 Amendments to the Rules. *Notes of the Advisory Committee on Revision of the Fed. Rules of Civ. Proc.*, 39 F. R. D. 110.

The Court in *Blue Chips* discussed the *Cascade* decision only in its discussion of timeliness, holding that in *Cascade* the Supreme Court had done no more than to exercise its right to protect and to assure obedience to its own previous mandate. It is true that in the litigation out of which *Cascade* arose, divestiture, under Section 7 of the Clayton Act, had previously been ordered by the Supreme Court, which divestiture the Court stated had not in any meaningful sense been accomplished. However, the majority opinion did not rest on this narrow ground. The Supreme Court stated that it was "California Interests" that were at the heart of the mandate. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra,* 17 L. Ed 2d at 819. Cascade Natural Gas Corporation, the only intervenor whose inter-

7. Thrifty Shoppers Scrip Company, one of the petitioners, filed its Notice of Appeal from the denial of intervention with this Court on November 15, 1967, and the decision of the District Court was affirmed by the U. S. Supreme Court sub nom., *Thrifty Shoppers Scrip Co. v. U. S.*, 36 L. W. 3278 (1968). In *Blue Chip*, as distinguished from this present case, the consent decree had been the subject of prolonged negotiations and modifications, and, prior to the applications to intervene, had been twice rejected by the District Court.

vention as of right was decided under new Rule 24, was a distributor of natural gas in Oregon and Washington. Without referring to its previous mandate, the Court stated that new Rule 24(a) was broad enough to include *Cascade*.

The antitrust laws lie at the heart of our competitive system. It is important that this Court clarify the rights of states and municipal bodies to protect their interests in that competitive system by intervening in antitrust actions brought by the United States where consent decrees are expected to terminate such actions. It is important that the effect of *Cascade* on this right of intervention be clarified in order to reconcile the disparate approaches to the interpretation of this decision evidenced by the liberal view of the Fifth Circuit in *Atlantis* and the restrictive view of the Ninth Circuit in *Blue Chips*.

C. The Question of the Propriety of the Consent Judgments.

The second important legal question before this Court is the propriety of the entry of consent judgments, containing denials of guilt, in cases involving flagrant violations of the antitrust laws in sales of a vital product, resulting in illegal charges paid by state and federal government funds.

Appellants requested in Paragraph Eight of their Motion to Intervene that the following language be added to the consent judgments:

> "(Defendants) having admitted the allegations contained in the Government's complaint herein, solely for the purpose and to the extent necessary to give to the following adjudication the *prima facie* effect stated in Sec. 1 . . .
>
> "Section 1. On the basis of the limited admission, defendants hereto engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the complaint, this adjudication

being for the sole purpose of establishing the *prima facie* effect of the Final Judgment in the suits specified below and for no other purpose:

"Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it." (The specific state suits so advantaged are then enumerated).

The District Court rejected this request. The consent judgments approved and entered by the District Court do not contain such language, although it was within the power of the Court to refuse to approve the consent judgments absent appellants' requested modification. "It is certainly within the power of the court to reject a proposed decree even when both sides consent." Dabney, *Consent Decrees Without Consent*, 63 Col. L. Rev. 1053, 1064 (1963). See also *U. S. v. Blue Chip Stamp Co., supra* at p. 84,502, in which the Court rejected a proposed decree and "outlined certain requirements it believed essential to any decree in settling the case."

The language proposed by petitioners is substantially similar to the "asphalt clause" which was made part of consent judgments entered in civil antitrust actions against a number of defendants for alleged price-fixing and bid-rigging in sales of asphalt, road tar, and bituminous concrete to governmental bodies in the New England area. *U. S. v. Allied Chemical Corp.*, 1961 Tr. Cas. ¶ 69,923 (D. Mass. 1960); *U. S. v. The Lake Asphalt & Petroleum Company of Massachusetts*, 1960 Tr. Cas. ¶ 69,835 (D. Mass. 1960); *U. S. v. Bituminous Concrete Association, Inc.*, 1960

Tr. Cas. ¶ 69,878 (D. Mass. 1960); See also *U. S. v. Koppers Company, Inc.*, 1961 Tr. Cas. ¶ 69,924 (D. Mass. 1960). In companion criminal cases, *nolo contendere* pleas had been accepted. Massachusetts Attorney General Edward J. McCormack, Jr., who had unsuccessfully appeared in opposition to the acceptance of the *nolo* pleas, urged, in a letter to the United States Attorney General, that some protective provision for the injured public bodies be included in the consent decrees. He stated:

> "To accept a *nolo* plea in a criminal case and then a consent decree in a civil action completely destroys for all intents and purposes the rights of the treble damage litigant which, in this case, happens to be sister-governments, i.e., the State of Massachusetts and the cities and towns therein." Letter from Massachusetts Attorney General Edward J. McCormack, Jr. to United States Attorney General William P. Rogers, February 13, 1960, quoted in Kaplan, *The Asphalt Clause—A New Weapon in Antitrust Enforcement*, Vol. III, No. 3, Boston College Industrial and Commercial L. Rev., 355, 358 (1962).

Since the entry of the "asphalt clause" consent decrees, the Antitrust Division of the Department of Justice

> "is now appraising the wisdom of considering, as one element of the public interest test which guides acceptance or rejection of the consent decree, the interest of the state or its subdivisions primarily injured by the violations alleged. This policy would apply where a state or its subdivision has borne the prime brunt of the violation alleged." Letter of Robert A. Bicks, Acting Assistant Attorney General, Antitrust Division, Department of Justice, March 30, 1960, 2 Tr. Reg. Rep. ¶ 8811.72.

On another occasion Mr. Bicks has stated:

> "We have felt that one of the factors properly to be considered by the Department of Justice and the courts alike in determining whether consent decrees should be accepted is the impact of any such acceptance upon the practical ability of the states and municipalities to secure recompense for the losses suffered by their citizenry . . . Thus we seek to make effective the right granted by Congress to the States to secure appropriate recompense." Bicks, *Antitrust Today*, 1961 N. Y. State B. A. Antitrust Law Symposium 15, 20.

The purpose of the "asphalt clause" is to advance the Congressional policy expressed in Section 5 of the Clayton Act, 15 U. S. C. Section 16, which makes a final judgment in any civil proceeding brought by the United States under the antitrust laws *prima facie* evidence against the defendants in any parallel action or proceeding brought by another party against those defendants. Section 5 provides that it does not apply to consent judgments or decrees entered before any testimony has been taken.

Congress, through Section 5 "has expressed its belief that private antitrust litigation is one of the surest weapons for the effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 318, 85 S. Ct. 1473, 14 L. Ed. 2d 405, 411 (1965). The purpose of Section 5 is to "assist private litigants in utilizing any benefits they might cull from government antitrust actions," *ibid.*, 381 U. S. at 317, 41 L. Ed. 2d at 410, and to "minimize the burdens of litigation for injured private suitors," *Emich Motors Company v. General Motors Corp.*, 340 U. S. 558, 568, 95 L. Ed. 534, 544 (1951), *reh. den.*, 341 U. S. 906, 96 L. Ed.

1345 (1951). See also *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 835 (9th Cir. 1964); *Bruce's Juices v. American Can Company*, 330 U. S. 743, 751, 91 L. Ed. 1219, 1226 (1947); *Olympic Refining Company v. Carter*, 332 F. 2d 260 (9th Cir. 1964), *cert. den.* 379 U. S. 900 (1964).

> "Private suits for treble damages have always been regarded as one of the strongest methods of securing compliance with the Sherman Act and as an integral part of enforcement policy . . . *The recovery of damages, more than any other means of enforcement, cancels the gains received from the violation and thereby minimizes the incentive to violate. The motivation for a conspiracy in restraint of trade is essentially financial. A financial penalty would thus seem to be an essential deterrent and, in some circumstances, afford a stronger therapeutic effect than criminal penalty or injunctive relief . . . . While the states and municipalities are public bodies, they, like other non-federal litigants, feel the need of a prima facie case. Its availability increases the probability that they will take steps to recover their damages; its absence acts as a discouraging factor, leading to inaction.*" Kaplan, *supra*, at 360-361. (Emphasis supplied.)

The importance of private treble-damage actions in overall antitrust enforcement has been considered and held controlling in the rejection of *nolo contendere* pleas in criminal antitrust proceedings. The acceptance of a *nolo* plea is similar to the effect of the approval of a civil consent decree without an "asphalt clause", in that it denies those directly injured by the violations the benefit of *prima facie* evidence. In *U. S. v. Standard Ultramarine & Color Company*, 137 F. Supp. 167 (S. D. N. Y. 1955), Judge Weinfeld rejected the entry of pleas of *nolo contendere* in Sherman Act prosecutions. Judge Weinfeld stated:

> *"While the defendants' arguments are couched in terms of concern for the public interest, acceptance of the plea would carry with it definite and incalculable advantages to the defendants . . . . It would, and this the defendants acknowledge as an overriding consideration, eliminate the impact of Section 5 of the Clayton Act . . . . And it is exactly for this reason that the Government contends that a plea of* nolo contendere *in this case would defeat rather than promote the public interest."* *Ibid.* at 169. (Emphasis supplied.)

Judge Weinfeld doubted that payment of fines really vindicated the public interest. The same might be said for the injunctions which have been approved in this suit, which do no more than provide that the defendants will comply with the law.

Judge Weinfeld went on to discuss Congress' policy of providing for effective enforcement of the antitrust laws and the expression of this policy in Section 5 of the Clayton Act, which was "fashioned as a powerful weapon to aid private litigants in their suits against antitrust violators by reducing the almost prohibitive costs and staggering burdens of such litigation in making available to him the results of the Government's successful action, whether an equity suit or a criminal prosecution." *Ibid.* at 172. He held that the "slap on the wrist" provided by fines and injunctions is in effect a removal of a powerful deterrent to law violation. See also *U. S. v. Fur Shearers Guild, Inc.*, 1959 Tr. Cas. ¶ 69,321 (S. D. N. Y. 1959).

Judge Weinfeld considered the following factors important in rejecting the *nolo* pleas: (1) the nature of the claimed violations, (2) the alleged length of time of the violations, (3) the size and power of the defendants in the particular industry, and (4) the impact of the condemned

conduct upon the economy. In the *Standard Ultramarine* case the violations alleged extended over a nine-year period. The offense charged was price-fixing, a *per se* violation, "one of the more serious infractions of the law", *ibid.* at 172, and the volume of business of the defendants was substantial: $30,000,000 out of a total national sales volume of $80,000,000. In the instant case the offense alleged is, similarly, price-fixing. Violations are alleged to have extended over at least a ten-year period. Over $100,000,000 worth of children's books are sold yearly to schools, libraries, and government bodies, of which library editions comprise sales of approximately $40,000,000 (Complaint, Paragraph 8) (Appendix C).

Moreover, educational materials are a commodity vital to the nation's welfare. In *U. S. v. Toledo Milk Distributors Association,* 1954 Tr. Cas. ¶ 67,918 (N. D. Ohio 1954), the court, in refusing to accept pleas of *nolo contendere,* rested its decision on the fact that the complaint of the Department of Justice had alleged price-fixing in an industry involving sales of a particularly vital commodity. See also *Commonwealth Edison Company v. Allis-Chalmers Mfg. Co.,* 323 F. 2d 412 (7th Cir. 1963) *(dicta).*

Some courts have declined to reject *nolo* pleas. See *U. S. v. Cigarette Merchandisers Ass'n, Inc.,* 136 F. Supp. 212 (S. D. N. Y. 1955). However, in this case, as was pointed out by Judge Weinfeld in *Standard Ultramarine,* there was pending a companion civil case which was to be litigated; thus private suitors might still be afforded *prima facie* evidence. In the instant case, only civil cases are pending. Absent an "asphalt clause", there is no possibility that applicants will have the benefits of *prima facie* evidence, to assist them in recovering the overcharges imposed on them in violation of antitrust laws by the defendants.

Nolo pleas have been denied by the District Courts in New York, California, Pennsylvania, Nebraska, North Da-

kota, Colorado, Massachusetts and Hawaii. See Citations collected in Clabault and Burton, *Sherman Act Indictments, 1955-1965* (1966), Appendix F (revised 1967).

Potential recoveries in private treble-damage actions are the most effective deterrent of violations of the antitrust laws. In exercising their discretion whether or not to accept *nolo* pleas or whether or not to approve stipulated consent judgments, courts should consider whether or not *prima facie* evidence will be available to plaintiffs in later private civil actions. See *Nolo Pleas in Antitrust Cases*, 79 Harv. L. Rev. 1475, 1481-82 (1966). "In cases of serious violations where substantial private injury has resulted, the policy of Section 5 should override any special considerations that would deny the evidentiary aid to injured parties and would permit defendants to avoid private liability." *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 Yale L. J. 845, 867-68 (1966). By the proviso excluding consent decrees from the operation of the *prima facie* effect of government proceedings, Congress did not intend to open the door to any willing defendant to escape from obligations for restitution to injured parties arising from its wrongdoings.

> "Congress made convictions in contested cases and convictions after guilty pleas binding in later suits; to argue that Congress meant, at the same time, to allow any defendant to escape who chose to by saying the magic Latin words is to make a mockery of the policy supporting section 5(a). And since the main purpose of that policy was to aid plaintiffs in treble damage suits, it seems that the effect on such suits should be considered when the court, by accepting or rejecting *nolo*, determines whether the defendant will be excepted from section 5(a)." *Nolo Pleas, supra*, 79 Harv. L. Rev. at 1483.

In the instant case price fixing is involved, as was the case in *U. S. v. Ward Baking Company*, 376 U. S. 327, 331-32, 84 S. Ct. 763, 11 L. Ed. 2d 743, 748 (1964):

> "The conspiracy alleged in the complaint was a particularly flagrant one . . . . 'acts in disregard of law call for repression by sterner measures than where steps could reasonably have been thought permissible.' 340 U. S. at 89-90, 95 L. Ed. at 101. The acts here alleged could not, under any theory, have been thought permissible."

It has been argued that Section 5 expresses a Congressional policy in favor of consent judgments in order to gain speedy enforcement. However, consent judgments absent admissions of guilt are most appropriate when the acts complained of involve new or disputed areas of antitrust law applicability. It is anomalous to approve a consent judgment which is essentially an escape from punishment in cases involving acts which are, undeniably, flagrant, willful, and *per se* illegal.

The states and municipal governments who are appellants here have an unique interest in seeing that the antitrust laws are meaningfully enforced and that the deterrent of treble damage recovery is made feasible by a truly adversary proceeding in the United States' actions. As in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E. D. Pa. 1962):

> "The unique nature of these cases . . . must be given considerable weight . . . [M]ost of these plaintiffs—states, municipalities, and public utilities—are inherently charged with the duty to protect wide reaching public interests."

As in the asphalt cases, a state attorney general has written to the United States Attorney General requesting

that, in these book cases, admissions of commission of acts in violation of the Sherman Act be made part of the consent decrees. Letter of Frank J. Kelly, Attorney General of Michigan, to Hon. Ramsey Clark, Attorney General of the United States, November 8, 1967 (Appendix D). Similarly, the National Association of Attorneys General, on August 30, 1967, adopted a resolution recognizing (1) that the various states have been the victims of numerous price fixing conspiracies, (2) the need for treble damage actions to recoup overcharges, and (3) the limitations placed on the attorneys general of the states in adequately investigating and preparing antitrust cases, and resolved that their Antitrust Committee should make recommendations involving ways and means of improving cooperation between the states and the Federal government and among the states in pursuing antitrust remedies (Appendix E).

Private antitrust litigation is growing, *Nolo Pleas in Antitrust Cases, supra* at 1478, and state participation in federal treble damage suits is growing, as the states, more and more, recognize that they have been victimized by overcharges through antitrust violations. We submit that this Court should clarify the rights of the states and municipal bodies to intervene in suits brought by the Government, and to set guidelines to be used by the Nisi Prius court in determining when a consent judgment absent admissions of liability will be approved.

Apart from the importance of the issues of law involved, and their direct impact on all education throughout the United States, there is an additional reason that this Court should review the actions of the District Court. This appeal comes to this Court directly from the District Court, in accordance with the Expediting Act of February 11, 1903, *supra*, 15 U. S. C. Sec. 29. Absent review by this Court, appellants have no other forum to which to turn for

review of what they consider to be erroneous rulings by the District Court.

> "(I)n antitrust cases . . . our practice, particularly in cases of direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violations proved. 'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court.' . . . *International Boxing Club v. U. S.*, 358 U. S. 242, 253, 3 L. Ed. 2d 270, 278, 79 S. Ct. 245 (1959) . . .
>
> "(T)he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it . . .
>
> "Our practice reflects a situation created by the congressional authorization, under Sec. 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '. . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' *Hartford-Empire Company v. U. S.*, 324 U. S. 570, 571, 89 L. Ed. 1198, 1200, 65 S. Ct. 815 (1945)." *U. S. v. DuPont De Nemours & Company*, 366 U. S. 316, 323-35, 81 S. Ct. 1243, 6 L. Ed. 2d 318, 323-24 (1961).

CONCLUSION.

Appellants, in their appeal, present substantial questions of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA, *Plaintiff*, v. HARPER & ROW PUBLISHERS, INC., et al., *Defendants.*	No. 67 C 612 and related cases 67 C 613 through 67 C 629.

Order.

WHEREAS, on October 23, 1967 the parties to each of the above cases filed a stipulation consenting to the entry of a final judgment therein in the form attached to the stipulation, at any time after the expiration of 30 days following that date, provided that plaintiff could withdraw its consent at any time within the period of 30 days, and

WHEREAS, the period of 30 days has expired and plaintiff has not withdrawn its consent, and

WHEREAS, subsequent to the filing of the stipulations various applications for leave to intervene in the above cases, and supplements and amendments thereto, were filed by the States of Illinois, West Virginia, Massachusetts, Michigan, Texas, Wisconsin, Hawaii, Oregon, Washington, Alaska, Indiana and Ohio, and the Cities of Chicago, San Francisco, San Diego, Boston, New York, Baltimore,

Rochester, Madison Heights, Los Angeles, Tampa, and Philadelphia, and the Boards of Education of the Cities of Chicago, Passaic, Newark, and East Orange, and the School District of Philadelphia, Downingtown Area School District, Rahway Board of Education, Madsion School District, Board of Public Instruction of Dade County, and Linden Board of Education, which applications seek *inter alia* modifications in the form of final judgment and preservation of, and access to, certain documents in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice, and

WHEREAS, thereafter memoranda of law were filed by the applicants for intervention in support of their applications, and by plaintiff and by defendants in response and opposition to the applications, and

WHEREAS, on November 13, 1967 the above cases came on for hearing on the applications for intervention; the Court heard oral argument by counsel for the applicants, for plaintiff, and for the defendants; additional modifications in the form of final judgment were orally proposed by counsel for the applicants, some of which were later submitted in writing as part of the applications for intervention; and the Court instructed counsel for plaintiff, defendants and the applicants to meet and discuss the proposed additional modifications as to whether there was any justification for including them in the form of final judgment; and

WHEREAS, thereafter said counsel did meet between and among themselves, on at least five separate occasions for that purpose, and

WHEREAS, on November 16, 1967 the above cases again came on for hearing on the applications for intervention;

the Court heard further oral argument and discussion by counsel for the applicants, for plaintiff, and for the defendants with respect to the proposed additional modifications in the form of final judgment; counsel for the applicants withdrew certain of the additional modifications they had proposed; and the Court recommended to counsel for plaintiff and the defendants that Section X of the form of final judgment be modified by additional language; and

WHEREAS, in accordance with the Court's recommendation plaintiff and defendants have this date orally stipulated in open Court to modify Section X of the form of final judgment so as to include as an additional paragraph at the end thereof the following:

> "Any [The word "such" was inadvertently omitted and Mr. Sarbaugh is attempting to add it.] information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws."

and

WHEREAS, in consequence of the applications for intervention and the hearings held thereon, the Court on Novem-

ber 20, 1967 entered an order impounding in the custody of John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division, United States Department of Justice, certain documents then in his custody, and

WHEREAS, after permitting all applicants for intervention to be fully heard as amici curiae, the Court has considered all of the written and oral arguments and matters presented to it, and is duly advised in the premises,

THE COURT HEREBY FINDS:

1. That none of the applicants for intervention has an interest relating to the property or transaction which is the subject matter of the above cases, within the meaning of subsection (a)(2) of Rule 24 of the Federal Rules of Civil Procedure.

2. That none of the applicants for intervention is so situated that the disposition of the cases may as a practical matter impair or impede its ability to protect such an interest, even if it exists, within the meaning of that subsection of that Rule.

3. That such an interest, even if it exists, is adequately represented by plaintiff herein within the meaning of that subsection of that Rule.

4. That granting to the applicants leave to intervene would unduly delay and prejudice the adjudication of the rights of plaintiff and the defendants within the meaning of Rule 24(b) of the Federal Rules of Civil Procedure.

THE COURT HEREBY CONCLUDES:

1. That none of the applicants for intervention is entitled to intervention of right under Rule 24(a) of the Federal Rules Civil Procedure.

2. That none of the applicants for intervention is entitled to permissive intervention under Rule 24(b) of such Rules.

IT IS THEREFORE HEREBY ORDERED that all applications for intervention heretofore filed in the above cases are denied.

ENTER:

/s/ A. L. MAROVITZ,
Judge.

DATED: November 27, 1967.

APPENDIX B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE BOBBS-MERRILL COMPANY, INC.,
Defendant.
CIVIL ACTION
No. 67 C 613.

Stipulation.

It is stipulated by and between the undersigned parties by their respective attorneys, that:

1. The parties consent that a Final Judgment in the form hereto attached and filed herewith may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without any further notice to any party or other proceeding, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as hereinafter provided.

2. The plaintiff may withdraw its consent hereto at any time within the said period of thirty (30) days by serving notice thereof upon the other party hereto and filing said notice with the Court.

3. In the event plaintiff withdraws its consent hereto, neither this proceeding nor the making of this Stipulation nor the filing of the attached Proposed Final Judgment

shall in any manner prejudice any consenting party in any subsequent proceedings.

Dated: October 23, 1967

For the Plaintiff

/s/ D. F. Turner
Donald F. Turner
Assistant Attorney General

/s/ William T. Huyck
William T. Huyck

/s/ Baddia J. Rashid
Baddia J. Rashid

/s/ John Edward Burke
John Edward Burke

/s/ Harry N. Burgess
Harry N. Burgess

/s/ David J. Berman
David J. Berman

/s/ John E. Sarbaugh
John E. Sarbaugh

Attorneys, Department of Justice

Attorneys, Department of Justice.

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For the Defendant:

/s/ W. Donald McSweeney
W. Donald McSweeney

/s/ William A. Montgomery
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE BOBBS-MERRILL COMPANY, INC.,
Defendant.
CIVIL ACTION
No. 67 C 613.

At Chicago, Illinois, in said Division and District on November 27, 1967.

Final Judgment.

Plaintiff, United States of America, having filed its complaint herein on April 18, 1967, and defendant having filed its answer thereto denying the substantive allegations thereof, and plaintiff and defendant by their respective attorneys having consented to the making and entry of this Final Judgment without admission by either party in respect to any issue;

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to

protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used herein:

(A) "Defendant" means the defendant The Bobbs-Merrill Company, Inc., a corporation organized and existing under the laws of Indiana, and each of its domestic subsidiaries and each of its foreign subsidiaries when doing business through or with any reseller in the United States;

(B) "Person" means any individual, corporation, partnership, firm or other legal entity and includes wherever applicable any Federal, State or local or other governmental agency or instrumentality thereof;

(C) "Customer" means any school, library or governmental agency or instrumentality thereof;

(D) "Reseller" means any person who is engaged in the business of buying books for resale and includes any such person when acting as an agent or consignee of defendant; and

(E) Solely for purposes of Section VII(A) and (B), the term "any person engaged in the resale of books purchased from defendant" shall not be deemed to include the national distributor of paperbacks who functions as defendant's sole national distributor.

III.

The provisions of this Final Judgment applicable to the defendant shall also apply to each of its officers, directors, agents and employees and to each of its succes-

sors and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply to sales for use outside the United States, except for sales to or for the use of the plaintiff or any instrumentality or agency thereof.

IV.

Defendant is ordered and directed:

(A) Within ninety (90) days after entry of this Final Judgment, to mail a copy thereof to each of its currently active wholesale accounts which sells to customers; for a period of five (5) years after such entry to mail a copy to each such additional wholesale account to whom it sells books; and to maintain for such five (5) year period a complete list of all such wholesale accounts to whom defendant has so mailed copies;

(B) To issue a written statement to the effect that this Final Judgment prohibits the defendant from fixing, determining, dictating, approving or disapproving the customers to whom or the prices at which any reseller may sell or advertise defendant's books to any school, library or governmental agency or instrumentality, the statement to be circulated by either one of the following means:

(1) By mailing, within six (6) months after entry of this Final Judgment, to the currently active list of schools, libraries and governmental agencies and instrumentalities to whom it mails catalogues; or

(2) By publication in an issue of *School Library Journal* published not later than two (2) months after entry of this Final Judgment.

(C) Within six (6) months after entry of this Final Judgment, to furnish plaintiff with a written statement of the form and manner of compliance with the provisions of subsection (B) of this Section IV;

(D) For a period of one (1) year after entry of this Final Judgment, to furnish a copy thereof to any school, library or governmental agency or instrumentality requesting it.

V.

For a period of five (5) years after the date set forth in this Section V, defendant is enjoined and restrained, in connection with the pricing of its books, except textbooks, from directly or indirectly, in any manner, using the words "net" or "net price" in or on such books or in any catalogue, price list, circular or other bulletin when referring to such books; provided, however, that this Section V shall not apply to any now-existing copies of such catalogues, price lists, circulars or other bulletins until January 1, 1968 or to now-existing copies of such books.

VI.

Defendant is enjoined and restrained from, directly or indirectly, in any manner:

(A) Fixing, determining, dictating, approving, disapproving, or policing the customers to whom, or the prices or related terms and conditions of sale at or upon which any reseller may have sold, sells, advertises or offers to sell any books to any customer;

(B) Suggesting (otherwise than by imprinting any price, without more, on a book or book jacket) to any reseller the prices or related terms and conditions of sale at which said reseller should sell, advertise or offer to sell any books to any customer;

(C) Hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent any reseller from advertising for sale, selling or offering to sell any books (1) to any customer or (2) to any customer at any price or related terms and conditions of sale individually determined by such reseller;

(D) So long as defendant sells books to resellers, refusing to sell or offer to sell or threatening to refuse to sell or offer to sell such books to, or coercing, or discriminating in the sale or shipment of any books to, any reseller because of the prices at which said reseller intends to sell or has sold any books to any customer;

(E) Inducing or suggesting to any reseller that such reseller refuse to deal with or discriminate against any third person with respect to the sale, distribution, purchase or shipment of any books to any customer; and

(F) Issuing or disseminating defendant's customer prices in any promotional material directed to resellers or in any price catalogues, lists, circulars or bulletins with respect to books sold by resellers unless such material contains a statement, in easily legible type, that any reseller is free to charge whatever price he wishes for defendant's books; provided, however, that this Section (F) shall not apply to any now-existing copies of such promotional material, catalogues, lists, circulars or bulletins until January 1, 1968.

Provided that, upon the expiration of a period of five (5) years following the date of entry of this Final Judgment, nothing contained in Section VI of this Final Judgment shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VII.

In addition to the prohibitions of Section VI, above, defendant is enjoined and restrained from entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person engaged in the resale of books purchased from defendant to:

(A) Fix, establish, maintain or adhere to prices in the sale of its books to any third person;

(B) Refuse to sell its books to any third person because of the price or prices at which, or persons to whom such third person intends to sell, advertise, or display or may have sold, advertised or displayed such books;

(C) Submit collusive or rigged bids or quotes for supplying any of its books to any third person; or

(D) Bid or quote a specific price, or refrain from bidding or quoting, on any of its books to be sold to any third person;

Provided that, subject to Section VI of this Final Judgment, nothing contained in this Section VII shall prohibit the defendant from lawfully exercising such rights, if any, or performing such obligations, if any, as it may have arising under the Miller-Tydings Act and the McGuire Act.

VIII.

Nothing contained in this Final Judgment shall be deemed to prohibit the defendant from complying with requirements imposed upon it by State or local law or by any governmental agency or instrumentality acting pursuant to State or local law.

IX.

For a period of five (5) years following the date of the entry of this Final Judgment, defendant is ordered

and directed to furnish simultaneously with each sealed bid and sealed quotation (other than a bid or quotation for a sale which will involve less than $100) submitted by it to any customer for the sale of books, other than textbooks, a written certification by the official of defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result, directly or indirectly, of any agreement, understanding, plan, or program between defendant and any other person.

X.

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant (which may have counsel present), made through its principal office, be permitted, subject to any legally recognized privilege, (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendant, and without restraint or interference from it to interview officers or employees of the defendant, who may have counsel present, regarding any such matters; and upon such request, defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the De-

partment of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

Any such information evidencing a violation of this Final Judgment which adversely affects the interest of any State or local governmental agency or instrumentality shall be retained by plaintiff for a period of one (1) year from the time when it is obtained and shall be treated as impounded subject to further order of this Court which, on motion and notice to the parties and a showing of good cause by the principal law officer of any State or local governmental agency or instrumentality, may order disclosure to such officer of any part or all of such information as the Court deems proper for use by such agency or instrumentality preliminarily to or in connection with an action under the federal antitrust laws.

XI.

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: November 27, 1967.

ENTER:

/s/ ABRAHAM L. MAROVITZ,
United States District Judge.

APPENDIX C.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA, *Plaintiff*, *v.* THE MACMILLAN COMPANY, *Defendant.*	CIVIL ACTION. No. 67 C 622. Equitable Relief Sought.

Complaint.

(Filed April 18, 1967.)

The United States of America, by its attorneys, brings this action against the above-named defendant and alleges as follows:

I.

JURISDICTION AND VENUE.

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. § 4), commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U. S. C. § 1).

2. Defendant The Macmillan Company maintains offices and transacts business within the Northern District of Illinois.

II.

Definitions.

3. The term "children's books" shall mean "juveniles" as generally understood in the publishing industry, referring to books designed for use by children of elementary and secondary school age.

4. "Library editions" shall mean children's books in reinforced bindings sold primarily to schools and libraries, or children's books which have a "net price."

5. The term "wholesaler" shall mean any person or company which buys library editions of children's books from publishers and resells them to schools, libraries, governmental bodies, or bookstores.

III.

The Defendant.

6. The Macmillan Company (hereinafter referred to as "Macmillan") is hereby made a defendant herein. Macmillan is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. During the period of time covered by this complaint, Macmillan engaged in the production and sale of library editions of children's books throughout the United States.

IV.

The Co-Conspirators.

7. Various companies and persons not made defendants herein participated as co-conspirators with the defendant in the combination and conspiracy charged herein and performed acts and made statements in furtherance of said offense. Said co-conspirators include numerous wholesalers located throughout the United States.

V.

Nature of Trade and Commerce.

8. Schools, libraries, and governmental bodies purchase over $100,000,000 worth of children's books per year of which library editions comprise sales of approximately $40,000,000. This represents the major part of the total sales of children's books in the United States. Most of these purchases are made with public funds expended by State and local governments and by the Federal Government. Substantial amounts of federal funds are made available to State and local governments for the purchase of children's books.

9. Schools, libraries, and governmental bodies purchase children's books from wholesalers and directly from publishers, including defendant Macmillan; wholesalers and publishers solicit many of the same customers in their efforts to sell children's books.

10. Traditionally, schools, libraries, and governmental bodies have benefited from competition among wholesalers and publishers in the granting of discounts on purchases of children's books. Many schools, libraries, and governmental bodies buy children's books by means of competitive bids.

11. In recent years, publishers and wholesalers have classified certain children's books as "library editions" and have sold such books, without discount, at uniform "net prices" to schools and libraries.

12. Defendant Macmillan has produced library editions and has established "net prices" on these editions. Its sales of Macmillan library editions in 1965 exceeded $1,000,000.

13. During the period of time covered by this complaint, defendant Macmillan sold and shipped substantial

quantities of library editions of children's books in interstate commerce to customers located in States other than the States from which said children's books were shipped.

VI.

Offenses Charged.

14. Beginning at least as early as 1961, the exact date being to the plaintiff unknown, and continuing thereafter until the date of the filing of this complaint, the defendant and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U. S. C. § 1).

15. The aforesaid combination and conspiracy consists of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators to fix, maintain, and stabilize prices on Macmillan library editions.

16. During the period of time covered by this complaint, the defendant has entered into a series of contracts in restraint of the aforesaid interstate trade and commerce in library editions of children's books in violation of Section 1 of the Sherman Act, as amended (15 U. S. C. § 1).

17. The aforesaid contracts consist of agreements between the defendant and each of the co-conspirators to fix, maintain, and stabilize prices on Macmillan library editions.

18. Pursuant to and in effectuation of the aforesaid combination and conspiracy, and the aforesaid contracts, the defendant and co-conspirators did those things which, as hereinbefore alleged, they agreed to do. Said offenses will continue unless the relief hereinafter prayed for is granted.

VII.

Effects.

19. The aforesaid combination and conspiracy and the aforesaid contracts have had, among others, the following effects:

(a) Prices of Macmillan library editions have been fixed, maintained, and stabilized at high, artificial, and noncompetitive levels;

(b) Price competition between defendant and the co-conspirators, and price competition among the co-conspirators, in the sale of Macmillan library editions has been suppressed and eliminated; and

(c) Schools, libraries, and governmental bodies have been deprived of the benefits of competitive bids and discounts in the sale of Macmillan library editions.

Prayer.

Wherefore, plaintiff prays:

(A) That the Court adjudge and decree that the defendant and co-conspirators have unreasonably restrained the aforesaid interstate trade and commerce in children's books, as hereinabove alleged, in violation of Section 1 of the Sherman Act.

(B) That the defendant, its successors, assignees, and transferees, and the officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid offenses and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(C) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined from:

(1) Using the term "net" or "net price" in connection with any catalogue, price list, circular, or other announcement concerning its books;

(2) Suggesting prices at which its books are to be resold by any purchaser thereof;

(3) Refusing to sell, or delaying shipments, or misdirecting shipments or discriminating in any way, or threatening to refuse to sell or delay shipments or misdirect shipments or discriminate in any way against any purchaser of its books because of the prices at which said purchaser resells or offers to resell defendant's books; and

(4) Restricting, limiting or preventing or attempting to restrict, limit or prevent any person from selling or offering to sell any books at any price, or upon any terms or conditions as such person may individually determine.

(D) That defendant, its officers, directors, agents, and employees, and its successors, assignees, and transferees, and all persons acting or claiming to act on behalf thereof, be ordered to notify in writing (1) all of its wholesaler customers that they may resell its books at any price they may choose and (2) all of the schools, libraries, and governmental bodies whom defendant solicited during the past four years that defendant does not in any way attempt to restrict or limit any person from selling or offering to sell its books at any price, or upon any terms or conditions as such person may individually determine.

(E) That the Court order defendant to annex to every sealed bid or quotation on books a written certification by

an officer of defendant, or by the official of defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any publisher, wholesaler, or other competitor.

(F) That defendant be enjoined from quoting published or "list" prices, or any other price mathematically determinable by its competitors from the pattern of prices previously quoted by defendant, in sealed bids covering books to federal, state, or local governmental bodies, or to schools or libraries, where the value of books to be purchased pursuant to such bid exceeds $100,000.

(G) That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

(H) That the plaintiff recover the costs of this action.

Dated: April 18, 1967.

RAMSEY CLARK
Ramsey Clark
Attorney General

DONALD F. TURNER
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APPENDIX D.

Nov. 8, 1967

Honorable Ramsey Clark
Attorney General
Department of Justice
Washington, D. C.

Dear General Clark:

Re: *Price Fixing Conspiracies Relative to Library Books*

It has come to my attention that the Department is completing prosecutions of eighteen publishers of library books and that consent decrees against those publishers are now being considered. (*U. S. v. Harper and Row Publishers, Inc.*, U. S. D. C., N. D. Ill., Eastern Division, #67 C 612 et seq.) I am one of several Attorneys General representing states which have filed treble damage suits against substantially the same defendants. In fact, Michigan, along with West Virginia, Massachusetts, Texas, and Wisconsin, now has pending in the Chicago court a motion for leave to intervene in the Department's civil suits against the library book publishers, for the purpose of objecting to entry of consent judgments in the form presented to the court, and to protect the interest of the public as represented in the treble damage actions pending on behalf of our states' taxpayers. Michigan is particularly interested in protecting the work product of the Department's suit, since it was in substantial part developed by Senator Philip A. Hart, of Michigan, in hearings of the Antitrust Committee of the Senate, and made available to the federal grand jury.

The result of the conspiracy or conspiracies involved consisted of substituting library editions for trade editions sold to libraries and schools, and by this and other means eliminating previous trade discounts ranging from ten to forty percent. (Some of us who have been investigating this feel that the average loss of discount approximates 33⅓%, but we cannot state from our present knowledge how close this comes to the actual damages resulting therefrom.)

The practices which are the subject of your prosecutions and of your civil action significantly affect a substantial portion of school districts and public libraries in states throughout the nation. As you know, under Title II of the Elementary and Secondary Education Act of 1965, more than one hundred million dollars of federal money is made available to the states each year for improving school libraries, and this is only one source of funds allegedly overcharged by the conspiracy which is the subject of the litigation. Substantially all of these, and other public funds such as federal library funds, are affected by the conspiratorial diminution or elimination of trade discounts to public schools and libraries. The effectiveness of at least two major federal programs was, therefore, diminished.

In addition to the five states and numerous local municipalities which have already filed treble damage suits based on the above alleged conspiracy, other states contemplate filing similar actions. Therefore, I feel that the federal government has a significant interest in seeing that as many public agencies as possible, including the states, recover overcharges to their taxpayers resulting from the conspiratorial practices referred to. I therefore urge you to give all appropriate aid to any interested state to achieve this end.

It is appropriate in this connection that I call your attention to a resolution adopted by the National Association of Attorneys General, of which I am currently president, at its anual meeting on August 30, 1967, relative to the increasing public need for more effective antitrust enforcement by the states, and the necessity of developing better cooperation between the Department of Justice and the states as well as among the states. I write this letter as Attorney General of the State of Michigan rather than as President of the Association, of course, but forward for your attention a copy of the resolution referred to as germane to the subject being discussed.

Specifically, I request that you consider the following actions:

1. Insist on including in the consent decrees an "asphalt clause" which would protect the interests of the public money purchasers injured by the conspiracies.

2. Conducting in the Department of Justice a seminar or symposium for attorneys representing the Attorneys General of the several states and other units of government to give them the benefit of the know how and work product of these employees of the Department of Justice who have worked on this matter.

We realize that the filing of these cases was preceded by a grand jury investigation and that the transcript of grand jury proceedings or any part of it cannot be revealed without a court order. However, except for this, the know how and work product of your attorneys and economists can be made available and it seems to us it should. Especially with costs of government and taxes rising to a point of national emergency, we can see no reason why legal and economic work already completed by federal employees

should be needlessly duplicated by state employees, which will be the case if the federal work product is not made available to the states. It is in the common interest of the federal and state governments to avoid such waste.

Your earnest consideration of these proposals will be greatly appreciated.

Yours sincerely,

FRANK J. KELLEY,
Attorney General
of Michigan.

Enclosure
FJK:cc

APPENDIX E.

Resolution adopted by: 61st Annual Meeting
National Association of Attorneys General
August 30, 1967
Portland, Oregon

IX. Cooperative Action in Price-Fixing Conspiracies

Whereas the various states, their agents and subdivisions have been the victims of numerous price-fixing conspiracies which are commonly regional or national in nature and involve interstate commerce; and

Whereas since our last meeting various state Attorneys General either have maintained cases to recover treble damages on overcharges made to public agencies within their states pursuant to such conspiracies or have had reported to them by reliable sources the existence of such conspiracies in at least 22 interstate industries; and

Whereas the recoveries achieved in such cases have resulted in significant relief to state and local taxpayers and constitute a substantial means of enforcing the federal antitrust laws; and

Whereas few if any state Attorneys General either have or can get sufficient personnel adequately to investigate and prepare antitrust cases in as many as 20 or more industries before the statutes of limitations run on them; and

Whereas most such treble damage suits brought by states, their agencies and subdivisions, are based at least

in part on investigations and prosecutions brought by the United States; and

WHEREAS many such treble damage suits based upon the same conspiracy are commonly joined for discovery and pre-trial purposes pursuant to the new federal rules and practices relating to multiple litigation; and

WHEREAS past experience has demonstrated that many efficiencies, benefits and economies can be achieved by cooperation among states interested in asserting claims for treble damages resulting from the same interstate price-fixing conspiracy;

NOW, THEREFORE, BE IT RESOLVED by the 61st Annual Meeting of the National Association of Attorneys General in Portland, Oregon that the Antitrust Committee of this Association be directed to make a recommendation to this Association as soon as is feasible on the following matters:

1. Ways and means of improving the cooperation between the several states and the federal government in this field;

2. Ways and means of improving the cooperation among the states in this field;

3. Ways and means of cooperating with quasi-public agencies such as the National Institute of Municipal Law Officers (NIMLO) in such matters; and

4. Desirable and feasible uses of the class action and the doctrine of parens patriae in such matters.